1989

State of Utah v. William Babbel: Reply to Response to Petition for Rehearing

Utah Court of Appeals

Paul Van Dam; Utah Attorney General; Judith Atheton; Assistant Attorney General; Attorneys for Appellee.
Walter F. Bugden, Jr.; Bugend & Lundgren; Appellee for Petitioner.

DOCKET NO. 890165-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	REPLY TO RESPONSE TO PETITION FOR REHEARING
vs.	:	
WILLIAM BABBEL,	:	
Defendant/Appellant.	:	Case No. 890165-CA

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An appeal from the sentence imposed in the Third District Court in and for Salt Lake County, State of Utah, the Honorable Scott Daniels presiding.

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Priority 2

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENT

The Appellant's sentencing on March 24, 1989, conducted pursuant to Babbel I, 770 P.2d 987 (Utah 1989) was not a "nunc pro tunc act". The trial court erred by declining to consider the Appellant's exemplary record at the prison since the date of his conviction.

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO CONSIDER THE APPELLANT'S EXEMPLARY PRISON RECORD AS A MITIGATING FACTOR AT HIS SENTENCING HEARING.

The sentences imposed by the trial court at the original sentencing hearing were illegal because they did not comply with U.C.A. § 76-5-405 and U.C.A. § 76-5-302. For that reason, this Court, in Babbel I, vacated the illegal sentences and remanded the case for re-sentencing.

The State, in its responsive brief has endeavored to justify the exclusion of the mitigating prison performance evidence by advancing a nunc pro tunc argument. However, the State has cited no authority in support of this argument. Rules of appellate advocacy dictate that the State's argument should be dismissed for this reason alone. (A brief on appeal must contain some support for each contention). State v. Wareham, 772 P.2d 960, 966 (Utah 1989); (an appellate court will not engage in constructing argu-

ments out of a whole cloth). State v. Lafferty, 749 P.2d 1239, 1247 n.5 (Utah 1988); (the Court declined to rule on a constitutional claim unsupported by legal analysis or authority). State v. Amicone, 689 P.2d 1341 (Utah 1984); also see Utah Rules of Appellate Procedure 24(a).

Notwithstanding the State's briefing error, the State's argument fails because the entry of the judgment following the sentencing hearing on March 24, 1989, was not a nunc pro tunc act. A Nunc Pro Tunc Order may be entered to reflect something which was actually done by the Court; however, this device may not be used to supply an omission in the record, i.e. for something which was not done. This Court has stated that "[a] motion nunc pro tunc is used to make the record speak the truth: it may not be used to correct the Court's failure to speak." Preece v. Preece, 682 P.2d 298, 299 (Utah 1984). (The function of the entry of a Nunc Pro Tunc Order is the correction of judicial records insofar as they fail to record, or improperly record, a judgment rendered by the Court, as distinguished from the correction of an error in the judgment itself or in the failure to render the judgment). DuPonte v. DuPonte, 53 Haw. 123, 488 P.2d 537 (1971); (the purpose of a Nunc Pro Tunc Order is to provide a means of entering the actual judgment of the trial court which for one reason or another was not properly recorded). Wallace v. Wallace, 214 Kan. 344, 520 P.2d

1221 (1974); (nunc pro tunc has reference to the making of an entry now, of something which was actually previously done, so as to have it effective as of the earlier date; it is not to be used to supply some omitted action of the court or counsel, but may be utilized to supply an omission in the record of something really done but omitted through mistake or advertence). Mora v. Martinez, 80 N.M. 88, 451 P.2d 992 (1969); (although a trial court by an Order Nunc Pro Tunc may correct the record judgment theretofore, it may not, by such an Order, render another or different judgment as one which it intended to render but did not). Humphrey Oil Corp. v. Lindsey, 370 P.2d 296 (Okla. 1961).

CONCLUSION

The challenged sentencing hearing was not a nunc pro tunc act. The proffered mitigation evidence was relevant and the trial judge was duty bound to consider all of the Appellant's circumstances on the day that he stood before the Judge for imposition of sentence. Both due process and a common sense reading of U.C.A. § 76-3-201(5)(c) mandate the consideration of the Appellant's exemplary behavior while incarcerated. The trial court's failure

to consider this evidence constitutes an abuse of discretion and necessitates a remand for an additional sentencing hearing.

DATED this 1st day of July, 1991.

Walter F Bugden

WALTER F. BUGDEN, JR.
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, first class postage prepaid, on this 29 day of July, 1991, to:

Judith Atherton
Assistant Attorney General
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Walter F Bugden

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines make restitution inappropriate.

(c) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall at the time of sentencing allow him a full hearing on the issue.

(4) As used in Subsection (3):

(a) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(b) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes, but is not limited to, the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses such as earnings and medical expenses.

(c) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including insured damages.

(d) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities. "Victim" does not include any coparticipant in the defendant's criminal activities.

(5) (a) If a statute under which the defendant was convicted mandates that one of three stated minimum terms shall be imposed, the court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime.

(b) Prior to or at the time of sentencing, either party may submit a statement identifying circumstances in aggravation or mitigation, or presenting additional facts. If the statement is in writing, it shall be filed with the court and served on the opposing party at least four days prior to the time set for sentencing.

(c) In determining if circumstances exist that justify imposition of the highest or lowest term, the court may consider the record in the case, the probation officer's report, other reports, including reports received under Section 76-3-404, statements in aggravation or mitigation submitted by the prosecution or the defendant, and any further evidence introduced at the sentencing hearing.

(d) The court shall set forth on the record the facts supporting and reasons for imposing the upper or lower term.

(e) The court in determining a just sentence shall consider sentencing guidelines regarding aggravation and mitigation promulgated by the Commission on Criminal and Juvenile Justice.

(6) (a) If a defendant subject to Subsection (5) has been sentenced and committed to the Utah State Prison the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the Board of Pardons, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if

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June 24, 1991

Geoffrey J. Butler, Clerk
Utah Supreme Court
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Salt Lake City, Utah 84114

RE: J.H. vs. West Valley City, et al.
Appeal No. 900052

Dear Mr. Butler:

By letter of June 14, 1991, Allan Larson, Counsel for West Valley City, alerted the court to three cases: D.T. v. Independent School District, 894 F.2d 1176 (10th Cir. 1990); Thomas v. Cannon, 751 F.Supp. 765 (N.N.D. Ill. 1990); and Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

The Johnson v. Rogers case was discussed during oral argument of this matter, and need not be discussed any further at this time. The Thomas v. Cannon case involves a bus driver, not a police officer. Furthermore, the driver was employed by a private agency which had contracted with the city, a much more tenuous relationship than the relationship of Officer Lyday to West Valley City.

The D.T. v. Independent School District case deals with a school teacher who allegedly molested students in conjunction with activities at a summer basketball camp conducted by the school teacher. The court in that case made a point of observing that the teacher "... was under no obligation to the school district. He was then on his free or summer vacation. As such, he had no duties or obligations owing to or functions to perform for the school district." (894 F.2d 1186. See also further discussion of this issue on subsequent pages.) The court also specifically distinguished the school teacher from a police officer case, even an "off-duty" police officer. (Id. at 1188.)

Sincerely,

ASHTON, BRAUNBERGER, POULSEN
& BOUD, P.C.

BY David A. Wilde
David A. Wilde

DAW/hyo